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In the Supreme Court OF THE United States

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OCTOBER TERM, 1949

No. 489

UNITED STATES SMELTING REFINING AND MINING COMPANY, a corporation, FIRST NATIONAL BANK OF FAIRBANKS, Executor of the Estate of Gustaf Soderblom, deceased, and WALTER JENSEN,

Petitioners,

vs.

EMMA GRACE LOWE,

Respondent.

PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

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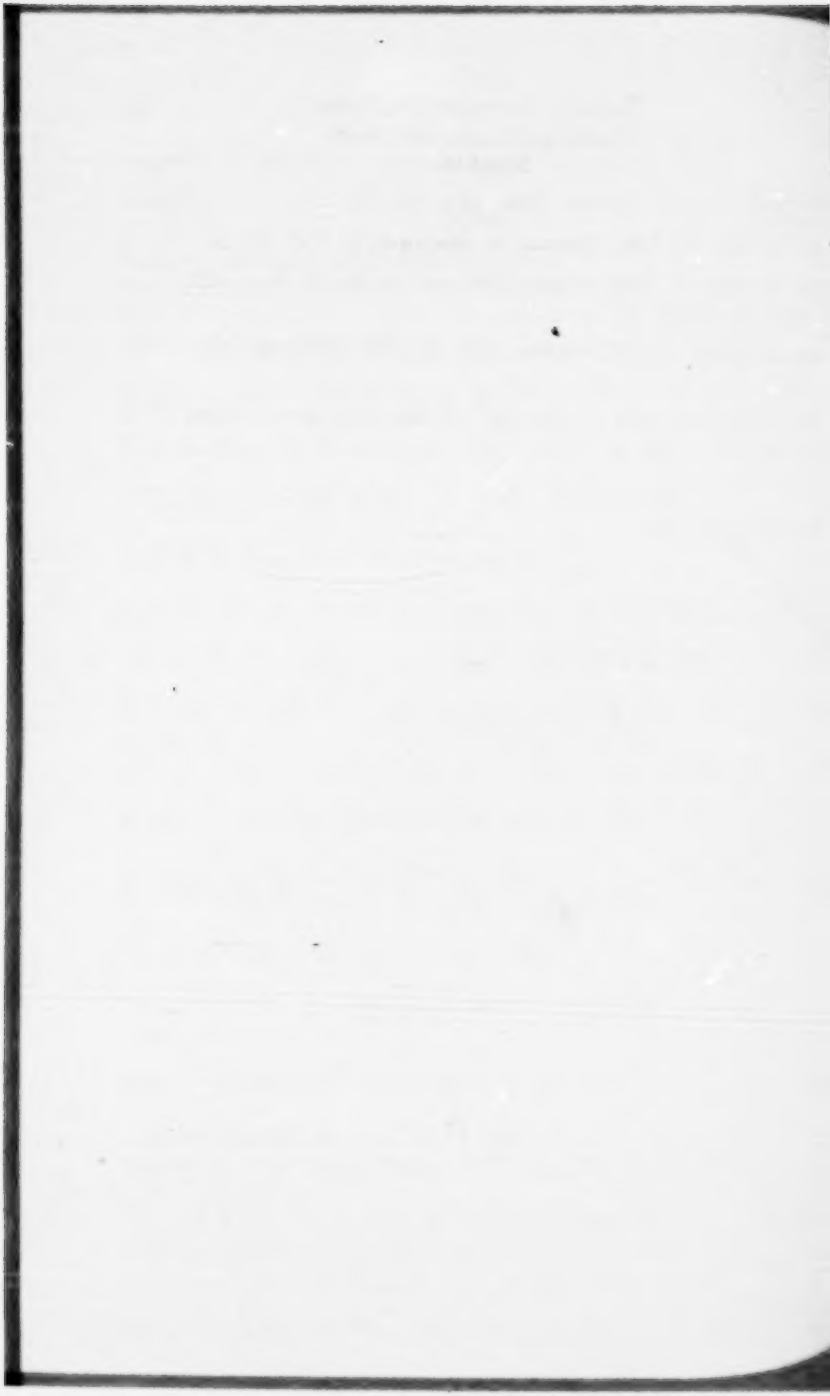
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UNITED STATES SMELTING REFINING AND MINING COMPANY, a corporation, FIRST NATIONAL BANK OF FAIRBANKS, Executor of the Estate of Gustaf Soderblom, deceased, and WALTER JENSEN,

Petitioners,

vs.

EMMA GRACE LOWE,

Respondent.

PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

The above named petitioners respectfully pray that a writ of certiorari be issued to review the judgment of

the United States Court of Appeals for the Ninth Circuit entered in the above-entitled cause (R. 184), reversing the decree of the District Court of the United States for the Territory of Alaska, Fourth Judicial Division (R. 63).

OPINIONS BELOW.

The findings of fact and conclusions of law of the District Court are set forth in the record at pages 53 to 62, and its opinion (R. 144) is reported in 74 F.Supp. 917. The opinion (R. 174) of the Court of Appeals is reported in 175 F.2d 486. The dissenting opinion of Pope, J., on rehearing (R. 186) is reported in 176 F. 2d 813.

JURISDICTION.

The judgment of the Court of Appeals was entered on June 21, 1949. Petitioners filed their petition for a rehearing on July 20, 1949, and said petition was denied on September 22, 1949. Jurisdiction of this court is invoked under sections 1254 and 2101 of the Judicial Code (Act of June 25, 1948, c. 646; 62 Stat. ....., 28 U.S.C. 1254, 2101).

STATUTES INVOLVED.

The statutes involved are set forth in the Appendix to this petition, and are as follows:

Revised Statutes, Section 2324; 30 U.S.C. 28;

Act of May 17, 1884, c. 53, sec. 8; 23 Stat. 24, 26;

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Act of June 6, 1900, c. 786, sec. 26; 31 Stat. 321, 329; 48 U.S.C. 381 (hereinafter referred to as the "1900 Act");

Act of March 2, 1907, c. 2559; 34 Stat. 1243; 48 U.S.C. 384 (hereinafter referred to as the "Waskey Act");

Act of May 31, 1938, c. 297; 52 Stat. 588; 48 U.S.C. 381 (hereinafter referred to as the "1938 Act").

STATEMENT OF THE CASE.

The primary question in this case concerns the laws of the United States applicable to Alaska relating to gold placer mining claims and their forfeiture for alleged failure to do annual assessment work. Until 1907 it was the law in Alaska, as in the United States, that annual assessment work be done on or for each mining claim and that if such work was not done the ground could be located by a stranger unless the owner of the claim had in good faith resumed his labor prior to such location (R.S. 2324; 30 U.S.C. 28). An equally important and settled law was that announced by Justice Field, when the laws of the United States relating to mining claims were being developed, that a junior locator claiming a forfeiture by reason of the failure of the senior locator to do his work had the burden of proving that failure *(Hammer v. Garfield Mining Co.* (1889) 130 U.S. 291).

By section 26 of the Act of June 6, 1900, Congress, as it had by section 8 of the Act of May 17, 1884, in similar language, extended to the Territory of Alaska "The laws

of the United States relating to mining claims, mineral locations, and rights incident thereto * * *."

In 1907 Congress passed the Waskey Act, applicable only to Alaska, which omitted the resumption of labor provision of Revised Statutes, section 2324, and provided for automatic forfeiture in the event of any failure to do the required work. The Waskey Act also provided that the owner *may* file an affidavit of performance of labor and that such affidavit was prima facie evidence of such performance; but if such affidavit was not filed the burden of proof should be upon the claimant to establish performance of such labor.

In 1938 when Congress amended the Act of June 6, 1900, in other respects, it re-enacted the provision of the 1900 Act which extended the mining laws of the United States to Alaska.

This case arises out of a dispute concerning the right to gold placer mining ground included in overlapping claims of petitioners and respondent. Petitioners' claims, The Snow Shoe Fraction and the L Association, were located in 1908, five years after gold was first struck in the Fairbanks district, and no question was ever raised concerning their validity or the titles of petitioners or their predecessors in interest until 1941, when respondent, for herself and another, staked out overlapping claims covering all of petitioners' The Snow Shoe Fraction and nearly all of the L Association. In 1945, respondent commenced proceedings to patent her overlapping junior claims. Petitioners duly filed adverse claims in the Land

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Office and commenced two quiet title actions in the District Court for the Territory of Alaska, Fourth Judicial Division (R. 2, 6) in support thereof.

The cases were consolidated for trial and an advisory jury gave its verdict in favor of petitioners, specifically finding that they and their predecessors as owners of the senior claims had not failed to do the required annual labor (R. 46).

The District Court made and filed its findings of fact and conclusions of law (R. 53), finding that the required annual labor had been performed upon each of petitioners' claims or that valid notices of intention to hold said claims had been filed (R. 58), and on April 6, 1948, said court made and entered its decree, quieting petitioners' titles to The Snow Shoe Fraction and the L Association (R. 63).

Respondents appealed to the Court of Appeals for the Ninth Circuit, and on June 21, 1949, the Court of Appeals entered its opinion and judgment reversing the decree of the District Court and remanding the cause for further proceedings (R. 174, 184). The Court of Appeals ruled as follows:

1. The automatic forfeiture provisions of the Waskey Act were repealed by the 1938 Act.

2. The burden of proof provisions of the Waskey Act were not repealed by the 1938 Act.

3. Petitioners had failed to prove the performance of the required annual labor.

4. The case should be returned to the District Court for findings in respect of the validity of respondent's locations.

On July 20, 1949, petitioners filed with the Court of Appeals their petition for a rehearing, and on September 22, 1949, said petition was denied (R. 185), one judge dissenting (R. 186).

SPECIFICATION OF ERRORS TO BE URGED.

The Court of Appeals for the Ninth Circuit erred:

1. In holding that the 1938 Act did not repeal the burden of proof provisions of the Waskey Act.

2. In holding that the petitioners had failed to prove annual labor.

3. In remanding the cause for findings in respect to the validity of respondent's locations and not allowing petitioners the right to a further hearing in the District Court on the question of the performance of annual labor by them and their predecessors in interest.

REASONS FOR GRANTING THE WRIT.

INTRODUCTION.

The rule of *Hammer v. Garfield Mining Co.* (1889) 130 U.S. 291, is that when a junior locator of a mining claim alleges that a senior location is void for failure to perform the annual labor required under R.S. 2324, the burden is upon the junior locator to prove such failure by clear and convincing evidence. The rule of the Waskey

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Act is that in such a situation, if the senior locator has not filed an affidavit of performance, the burden shall be upon him affirmatively to prove labor. The issue in both instances is the same: Was the labor done? Obviously, the burden of proving the affirmative and the negative of this issue cannot be put on the senior and junior locators, respectively, at the same time; it can be on only one or the other. The two rules are contradictory and cannot apply in the same jurisdiction at the same time in the same cause.

The Court of Appeals does not deny this contradiction. It avoids it. It says that the rule of *Hammer v. Garfield Mining Co.*, supra, is not part of "The laws of the United States relating to mining claims, mineral locations and rights incident thereto * * *," which were extended to Alaska in 1884, 1900, and again in 1938. In its decision, however, the Court of Appeals did not use the language of the statutes, which spoke of the laws "of the *United States.*"* Rather it used phrases such as "the general mining laws" and "the general law of Congress," which do not appear in any statute bearing upon the problem. We quote the reasoning of the Court of Appeals on which it bases its decision (R. 182):

> "In the first place there is no irreconcilable conflict between the general mining laws and these adjective provisions of the Waskey Act, nor, indeed, is any inconsistency apparent. As already noted, the general law of Congress does not itself declare where the burden of proof lies relative to the performance of annual labor. The rule casting the burden on the junior locator has been imported by the courts, not

*Italics supplied throughout.

> under the guise of statutory interpretation but rather as an application of a principle relating to forfeiture generally."

The question thus raised by the Court of Appeals is simply this: Is the burden of proof rule of *Hammer v. Garfield Mining Co.*, supra, a part of "The laws of the United States relating to mining claims, mineral locations and the rights incident thereto"?

This question, concerning as it does the construction and application of the mineral land laws, is of general interest and importance in all regions where those laws are operative, including Alaska. For this reason, as well as for the reasons set forth below, we urge this court to grant its writ of certiorari, as it did in the mining case of *Cole v. Ralph* (1919) 252 U.S. 286, 289.

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1. **THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF LOCAL LAW IN A WAY IN CONFLICT WITH APPLICABLE LOCAL DECISIONS.**

The Court of Appeals has reversed itself and every district court which has ever had occasion to consider the applicability of *Hammer v. Garfield Mining Co.*, supra. Never before has it been doubted that the burden of proof rule of that case was a part of the laws of the United States.

The Court of Appeals itself has so ruled.

Moodey v. Dale Consol. Mines (9 Cir. 1936) 81 F. 2d 794;

Betsch v. Umphrey (9 Cir. 1918) 252 Fed. 573;

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Walton v. Wild Goose Mining & Trading Co. (9 Cir. 1903) 123 Fed. 209, certiorari denied 194 U.S. 631.

The Alaskan district court has so ruled.

Debney v. Iles (1907) 3 Alaska 438;
Bakke v. Latimer (1906) 3 Alaska 95.

District courts in other districts have so ruled.

Wailes v. Davies (D.Nev. 1907) 158 Fed. 667;
Zerres v. Vanina (D.Nev. 1905) 134 Fed. 610;
Willitt v. Baker (W.D.Ark. 1904) 133 Fed. 937;
Justice Min. Co. v. Barclay (D.Nev. 1897) 82 Fed. 554.

As the court stated in *M'Culloch v. Murphy* (D.Nev. 1903) 125 Fed. 147 (p. 150):

"The law does not favor forfeitures. The penalty for failure to comply with the law is thus expressed in section 2324, Rev. St. [U.S. Comp. St. 1901, p. 1426]: 'Upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made.' The word 'forfeiture' is not used in the statute, although it is a comprehensive word to express results which flow from a failure to comply with the law. The rule is well settled that the forfeiture cannot be established except upon clear and convincing proof of the failure of the original locator to have work performed or improvements made to the amount required by law. The burden of proof to establish a forfeiture rests upon him who asserts it. Hammer v. Garfield M. & M. Co., 130 U.S. 291, 301, 9 Sup. Ct. 548, 32 L. Ed. 964; Book v. Justice M. Co., supra;

Justice M. Co. v. Barclay (C.C.) 82 Fed. 554, 559; Emerson v. McWhirter, 133 Cal. 510, 65 Pac. 1036; Axion M. Co. v. White, 10 S.D. 198, 201, 72 N.W. 462."

The Court of Appeals has thus overturned precedents of over fifty years' standing.

Over the period of years since *Hammer v. Garfield Mining Co*, supra, was decided in 1889, this procedural law has become more important to the miner than the substantive laws of resumption of labor and automatic forfeiture. This fact is most clearly seen when the problem is placed in its proper setting. This Court of Appeals decision is important to miners and the Alaskan mining industry because the evidence is rapidly drying up. Mining is a transient business, and miners, especially the old "sourdoughs," are nomadic types. Furthermore, the generation which originally located and developed Alaskan mining claims is fast dying off. Because of wilderness conditions, lack of transportation, and the like, only in recent years has there been any serious effort to record assessment work, that is, filing affidavits of annual labor. Therefore, the person who has the burden of proving that annual labor was or was not done twenty, thirty or forty years ago has a particularly difficult task. To say at this late date that the burden of proof is not a part of the laws of the United States relating to mining claims is to ignore the decisions of this court and all inferior federal courts, and to ignore the practical facts of American mining.

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2. **THE COURT OF APPEALS HAS DECIDED A FEDERAL QUESTION IN A WAY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.**

The decision of the Court of Appeals is based upon the assumption that the rule of *Hammer v. Garfield Mining Co.*, supra, was not developed as a matter of statutory interpretation. This assumption is incorrect, and the holding of the Court of Appeals is in conflict with prior decisions of this court, on this very point.

Revised Statutes, section 2324, require that the owner of a mining claim perform a certain amount of labor annually on or for his claim. The statute further provides for a forfeiture in the event he fails to do so and does not resume labor prior to location by a stranger. Nothing is said, however, as to whether, in an action between a junior and a senior locator, performance or failure to perform must be proved.

Hammer v. Garfield Mining Co., supra, arose under this statute, which was and is without a doubt a part of "The laws of the United States relating to mining claims, mineral locations and the rights incident thereto * * *." Faced with the conflicting claims of a junior and a senior locator and with the absence in Revised Statutes, section 2324, of any provision for burden of proof, this court had to settle the question itself. It was necessary to determine who had the burden of proving the issues raised by the statute. This the court did, and *under the statute* it held:

> "As to the alleged forfeiture set up by defendant, it is sufficient to say that the burden of proving it rested upon him; that the only pretence of a forfei-

> ture was that sufficient work, as required by law, each year, was not done on the claim in 1882; and that the evidence adduced by him on that point was very meagre and unsatisfactory, and was completely overborne by the evidence of the plaintiff. *Belk v. Meager*, 104 U.S. 279. A forfeiture cannot be established except upon clear and convincing proof of the failure of the former owner to have work performed or improvements made to the amount required by law." *(Hammer v. Garfield Mining Co.* (1889) 130 U.S. 291, 301, per Field, J.).

The holding of the Court of Appeals that the rule of the *Hammer* case was not the result of statutory interpretation is refuted by the very facts of the *Hammer* case. The holding is further refuted by this court in *El Paso Brick Co. v. McKnight* (1914) 233 U.S. 250, wherein it was said (pp. 259-260):

> "This conclusion makes it unnecessary to decide the question as to whether the territorial statute, imposing upon the locator the burden of proving that he has performed the annual assessment work, is void as being in conflict with the Federal statutes, which require no such annual proof, raise no presumption of abandonment and *as construed in Hammer v. Garfield*, 130 U.S. 291, demand clear and convincing proof that work has not been done before a forfeiture can be declared."

The Supreme Court, in a case arising under a law of Congress and interpreting that law, necessarily evolved a law on burden of proof, and:

> "It is not now disputed that when any question, arising under the laws of the United States, has

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been once clearly and unequivocally adjudicated by the supreme court, it is no longer a proposition for judicial inquiry by the inferior national courts. No issue growing out of any statute, which has been once so adjudicated, can be said to involve in its determination the construction of such statute. It has been construed; there is nothing left to construe. All there is left is to follow the construction given" (*Inez Min. Co. v. Kinney* (D.Idaho 1891) 46 Fed. 832, 834).

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3. **THE COURT OF APPEALS HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.**

The Court of Appeals has held that petitioners failed to prove annual labor during certain years between 1908 and 1938. This decision finally disposes of petitioners' rights, although respondent is given an opportunity to prove her affirmative allegations respecting her purported claims. Thus, almost two years after the trial, and contrary to the theory upon which the case was tried, the burden of proving labor is put on petitioners, and they are given no opportunity to support that burden.

Assuming that as a matter of law the ruling of the Court of Appeals shifting the burden of proof is correct, it can hardly apply retroactively to a trial conducted on the opposite theory and thus deny to petitioners the right to introduce evidence on a question as to which the trial court ruled they had no duty to offer evidence. It has long been the rule that if the record on appeal does not adequately reveal material facts or if the wrong theory has been

adopted in the trial court, the proper course is to remand the case so that *both* sides may have an opportunity to complete the record.

Stewart v. Southern Ry. Co. (1942) 315 U.S. 283;
Willing v. Binenstock (1937) 302 U.S. 272;
Villa v. Van Schaick (1936) 299 U.S. 152;
Security Mortgage Co. v. Powers (1928) 278 U.S. 149;
Marconi Wireless Co. v. Simon (1918) 246 U.S. 46;
United States v. Rio Grande Irrigation Co. (1902) 184 U.S. 416;
Wiggins Ferry Co. v. O. & M. Railway (1892) 142 U.S. 396.

Chief Justice Marshall is even reported to have said that "when a verdict in favor of a plaintiff is reversed, on a bill of exceptions to instructions given to the jury, there must be a new trial awarded by the court below" (*Hudson v. Guestier* (1810) 6 Cranch 281, footnote p. 285).

There can be no doubt that in fact the burden was upon respondent in the District Court. She assumed it in her answers by raising the issue of labor as a matter an affirmative defense (R. 14, 23), the trial judge consistently ruled that she had the burden (R. 80, 88-90, 98, 102-105, 112), and the jury was so instructed (R. 36).

By its decision on the question of proof, the Court of Appeals has put itself on the horns of a dilemma. Since, as that court points out (R. 175), the record on appeal contains no affirmative showing either way on the issue

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of labor, there are only the verdict of the jury and the findings of the trial court on which to base a decision. The verdict was that petitioners did not fail to do the labor (R. 46); the findings state that the labor was done (R. 58). Only two alternative inferences may be drawn from the record on appeal:

1. The work was done. The verdict and the findings support this conclusion, and there being no evidence to the contrary in the record (R. 175), the judgment must stand.

The City v. Babcock (1865) 3 Wall. 240;
Russell v. Ely, et al. (1862) 2 Black 575.

2. The work was not done. There is no evidence in the record to support this conclusion. Nevertheless, if this be the correct inference, and if the burden should properly have been put on petitioners, the fact remains that during the trial that burden was actually put on respondent, and petitioners then had no duty to offer evidence relating to matters pertaining to respondent's affirmative defense.

It follows either that the Court of Appeals erred in ruling that petitioners had failed to prove labor or that it erred in denying to petitioners (although granting to respondent) the right to a further hearing under the rules of law as changed by that court. Whichever be the case, the Court of Appeals should be directed to correct its error.

CONCLUSION.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Dated, San Francisco, California,
December 14, 1949.

Respectfully submitted,

SOUTHALL R. PFUND,

Attorney for United States Smelting Refining and Mining Company, a corporation, First National Bank of Fairbanks, Executor of the Estate of Gustaf Soderblom, deceased, and Walter Jensen, Petitioners.

PILLSBURY, MADISON & SUTRO,
ALLAN R. MOLTZEN,
Of Counsel.

(Appendix Follows.)

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Appendix

Revised Statutes, Section 2324; 30 U.S.C. 28:

"Mining district regulations by miners; annual labor on claims pending issue of patent; expenditure on tunnels considered

The miners of each mining district may make regulations not in conflict with the laws of the United States, or with the laws of the State or Territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining claim, subject to the following requirements: The location must be distinctly marked on the ground so that its boundaries can be readily traced. All records of mining claims made after May 10, 1872, shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim. On each claim located after the 10th day of May 1872, and until a patent has been issued therefor, not less than $100 worth of labor shall be performed or improvements made during each year. On all claims located prior to the 10th day of May 1872, $10 worth of labor shall be performed or improvements made each year, for each one hundred feet in length along the vein until a patent has been issued therefor; but where such claims are held in common, such expenditure may be made upon any one claim; and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open

to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location. Upon the failure of any one of several coowners to contribute his proportion of the expenditures required hereby, the coowners who have performed the labor or made the improvements may, at the expiration of the year, give such delinquent coowner personal notice in writing or notice by publication in the newspaper published nearest the claim, for at least once a week for ninety days, and if at the expiration of ninety days after such notice in writing or by publication such delinquent should fail or refuse to contribute his proportion of the expenditure required by this section, his interest in the claim shall become the property of his coowners who have made the required expenditures. The period within which the work required to be done annually on all unpatented mineral claims located since May 10, 1872, including such claims in the Territory of Alaska, shall commence at 12 o'clock meridian on the 1st day of July succeeding the date of location of such claim.

Where a person or company has or may run a tunnel for the purposes of developing a lode or lodes, owned by said person or company, the money so expended in said tunnel shall be taken and considered as expended on said lode or lodes, whether located prior to or since May 10, 1872; and such person or company shall not be required to perform work on the surface of said lode or lodes in

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order to hold the same as required by this section. On all such valid claims the annual period ending December 31, 1921, shall continue to 12 o'clock meridian July 1, 1922. R.S. §2324; Feb. 11, 1875,c. 41, 18 Stat. 315; Jan. 22, 1880,c.9, §2, 21 Stat. 61; Aug. 24, 1921,c.84, 42 Stat. 186."

Act of May 17, 1884, chapter 53, section 8; 23 Stat. 24. 26:

"Sec. 8. That the said district of Alaska is hereby created a land district, and a United States land-office for said district is hereby located at Sitka. The commissioner provided for by this act to reside at Sitka shall be ex officio register of said land-office, and the clerk provided for by this act shall be ex officio receiver of public moneys and the marshal provided for by this act shall be ex officio surveyor-general of said district and the laws of the United States relating to mining claims, and the rights incident thereto, shall, from and after the passage of this act, be in full force and effect in said district, under the administration thereof herein provided for, subject to such regulations as may be made by the Secretary of the Interior, approved by the President: * * *."

Act of June 6, 1900, chapter 786, section 26; 31 Stat. 321, 329; 48 U.S.C. 381:

"Sec. 26. The laws of the United States relating to mining claims, mineral locations, and rights incident

thereto are hereby extended to the District of Alaska: *Provided,* That subject only to such general limitations as may be necessary to exempt navigation from artificial obstructions all land and shoal water between low and mean high tide on the shores, bays, and inlets of Bering Sea, within the jurisdiction of the United States, shall be subject to exploration and mining for gold and other precious metals by citizens of the United States, or persons who have legally declared their intentions to become such, under such reasonable rules and regulations as the miners in organized mining districts may have heretofore made or may hereafter make governing the temporary possession thereof for exploration and mining purposes until otherwise provided by law: *Provided further,* That the rules and regulations established by the miners shall not be in conflict with the mining laws of the United States; and no exclusive permit shall be granted by the Secretary of War authorizing any person or persons, corporation or company to excavate or mine under any of said waters below low tide, and if such exclusive permit has been granted it is hereby revoked and declared null and void; but citizens of the United States or persons who have legally declared their intention to become such shall have the right to dredge and mine for gold or other precious metals in said waters, below low tide, subject to such general rules and regulations as the Secretary of War may prescribe for the preservation of order and the protection of the interests of commerce; such rules and regulations shall not, however, deprive miners on the beach of the right hereby given to dump tailings into or pump from the sea op-

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posite their claims, except where such dumping would actually obstruct navigation, and the reservation of a roadway sixty feet wide, under the tenth section of the Act of May fourteenth, eighteen hundred and ninety-eight, entitled 'An Act extending the homestead laws and providing for right of way for railroads in the District of Alaska, and for other purposes,' shall not apply to mineral lands or town sites."

Act of March 2, 1907, chapter 2559; 34 Stat. 1243; 48 U.S. C. 384:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That during each year and until patent has been issued therefor, at least one hundred dollars' worth of labor shall be performed or improvements made on, or for the benefit or development of, in accordance with existing law, each mining claim in the district of Alaska heretofore or hereafter located. And the locator or owner of such claim or some other person having knowledge of the facts may also make and file with the said recorder of the district in which the claims shall be situate an affidavit showing the performance of labor or making of improvements to the amount of one hundred dollars as aforesaid and specifying the character and extent of such work. Such affidavit shall set forth the following: First, the name or number of the mining claims and where situated; second, the number of days work done and the character and value of the improvements placed thereon;

third, the date of the performance of such labor and of making improvements; fourth, at whose instance the work was done or the improvements made; fifth, the actual amount paid for work and improvement, and by whom paid when the same was not done by the owner. Such affidavit shall be prima facie evidence of the performance of such work or making of such improvements, but if such affidavits be not filed within the time fixed by this Act the burden of proof shall be upon the claimant to establish the performance of such annual work and improvements. And upon failure of the locator or owner of any such claim to comply with the provisions of this Act, as to performance of work and improvements, such claim shall become forfeited and open to location by others as if no location of the same had ever been made. The affidavits required hereby may be made before any officer authorized to administer oaths, and the provisions of sections fifty-three hundred and ninety-two and fifty-three hundred and ninety-three of the Revised Statutes are hereby extended to such affidavits. Said affidavits shall be filed not later than ninety days after the close of the year in which such work is performed.

Sec. 2. That the recorders for the several divisions or districts of Alaska shall collect the sum of one dollar and fifty cents as a fee for the filing, recording, and indexing said annual proofs of work and improvements for each claim so recorded.

Approved, March 2, 1907."

POOR COPY

BLEED THROUGH

Act of May 31, 1938, chapter 297; 52 Stat. 588; 48 U.S.C. 381:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That section 26, title I, chapter 1, of the Act entitled 'An Act making further provision for a civil government for Alaska, and for other purposes', approved June 6, 1900 (31 Stat. 321), is amended to read as follows:

'Sec. 26. The laws of the United States relating to mining claims, mineral locations, and rights incident thereto are hereby extended to the Territory of Alaska: *Provided*, That, subject only to the laws enacted by Congress for the protection and preservation of the navigable waters of the United States, all land and shoal water between low and mean high tide on the shores, bays, and inlets of Alaska, within the jurisdiction of the United States, shall be subject to exploration and mining for gold and other precious metals by citizens of the United States, or persons who have legally declared their intentions to become such, under such reasonable rules and regulations as the miners in organized mining districts may have heretofore made or may hereafter make governing the temporary possession thereof for exploration and mining purposes until otherwise provided by law: *Provided further*, That the rules and regulations established by the miners shall not be in conflict with the mining laws of the United States; and no exclusive permit shall be granted by the Secretary of the Interior authorizing any person or persons, corporation or company, to excavate or mine under any of said waters below low

tide, and if such exclusive permit has been granted it is hereby revoked and declared null and void; but citizens of the United States or persons who have legally declared their intention to become such shall have the right to dredge and mine for gold or other precious metals in said waters, below low tide, subject to such general rules and regulations as the Secretary of the Interior may prescribe for the preservation of order; such rules and regulations shall not, however, deprive miners on the beach of the right hereby given to dump tailings into or pump from the sea opposite their claims, except where such dumping would actually obstruct navigation, and the reservation of a roadway sixty feet wide under the tenth section of the Act of May 14, 1898, entitled "An Act extending the homestead laws and providing for right of way for railroads in the District of Alaska, and for other purposes", shall not apply to mineral lands or town sites.'

Approved, May 31, 1938."